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No 00-1181.

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF ARIZONA,
PETITIONER,

-vs-

BRUCE LEWIS HOWELL,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE STATE OF ARIZONA COURT OF APPEALS,
DIVISION ONE

REPLY BRIEF

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FACTS OF THE CASE

Respondent contends that Petitioner's factual recitation of the case contains "unwarranted conclusions." (Brief in Opposition, at 1.) Petitioner's statement of facts is a fair presentation of the facts fully supported by the evidence admitted at trial and includes no "conclusions." Petitioner stands by the factual statement set forth in the petition.

REASONS WHY THE WRIT SHOULD ISSUE

Respondent asserts that *Nesbitt v. Hopkins*, 86 F.3d 118, 121 (8th Cir. 1996), does not relate to the issue whether collateral estoppel applies in a continuing prosecution. (Brief in Opposition, at 3–4.) However, the passage from that case that Respondent quotes illustrates exactly Petitioner's point. The "criminal rule of estoppel found in *Ashe v. Swenson*[1] . . . does not apply to verdicts of guilt and innocence rendered in a single trial." 86 F.3d at 121 (*quoting Arnold v. Wyrick*, 646 F.2d 1225, 1228 (8th Cir. 1981); (Brief in Opposition, at 4).

Nesbitt was tried for first degree murder. *Nesbitt*, 86 F.3d at 119. The trial court *dismissed* a charge of felony murder, and the jury *subsequently* convicted Nesbitt of premeditated murder. *Id.* Nesbitt argued on direct appeal that the evidence was insufficient to prove premeditated murder. *Id.* at 120. The Nebraska Supreme Court rejected that claim and gave a lengthy summary of the circumstantial evidence supporting Nesbitt's conviction; in the course of which, the court cited evidence supporting the underlying felony of which a lack of sufficient evidence prompted the trial court's dismissal of the felony murder charge. *Id.* at 119–20. On appeal from the district court's denial of his habeas corpus petition, Nesbitt argued that in affirming his conviction, the Nebraska Supreme Court violated the Double Jeopardy Clause, including the doctrine of collateral estoppel, by construing the trial evidence as establishing the acquitted charge of felony murder. *Id.* As the *Nesbitt* court framed the issue, Nesbitt sought "to apply a double jeopardy principle that governs successive prosecution cases like *Ashe* . . . to his single, multi-count trial." *Id.* at 121. Thus, the issue in *Nesbitt* is identical to that presented in this case.

Respondent is also incorrect when he asserts that *United States v. Farmer*, 923 F.2d 1557 (11th Cir. 1991), stands for nothing but the principle that conspiracy to commit a crime is a separate crime from the

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1. 397 U.S. 436 (1970).

substantive crime. (Brief in Opposition, at 4.) The *Farmer* court—addressing the propriety of a retrial of one count of a multi-count indictment after a mixed verdict—specifically noted that there was a question whether collateral estoppel, like its parent doctrine of double jeopardy, applies only to successive prosecutions. *Id.* at 1563, footnote 12. Without deciding that threshold question, the *Farmer* court went on to analyze what was actually litigated in the first trial. *Id.* at 1563. Rather than showing certiorari should not be granted, Respondent has illustrated why it is important for this Court to grant the petition for writ of certiorari and decide this question, which, despite Respondent's assertion, has *not* been conclusively determined. (Brief in Opposition, at 5.)

The Arizona Court of Appeals has improperly applied the *Ashe* doctrine of collateral estoppel in a continuing prosecution, as have some other federal and state courts, as noted in Petitioner's petition for writ of certiorari. This Court needs to resolve the question whether collateral estoppel is limited—like its parent doctrine of double jeopardy—to successive prosecutions, and is therefore inapplicable to a continuing prosecution involving a retrial from a multi-count indictment.

CONCLUSION

Based on the foregoing authorities and arguments, as well as those set forth in the petition for writ of certiorari, Petitioner respectfully requests this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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